

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Jaysen Alexander Patterson,

Petitioner

v.

Calvin Johnson, et al.,

Respondents

Case No. 2:20-cv-01614-JAD-DJA

**Order Granting in Part Motion to Dismiss
Second Amended Petition**

[ECF No. 36]

Counseled Nevada prisoner Jaysen Patterson brings this habeas corpus action under 28 U.S.C. § 2254 to challenge his 2015 state-court convictions for arson and burglary. Patterson has filed a second-amended petition asserting three grounds for relief: (1) ineffective assistance of trial counsel during sentencing, (2) denial of due process through bias of sentencing judge, and (3) ineffective assistance of trial counsel by allowing references of juvenile history to remain in a confidential mental-health evaluation.¹ Respondents moved to dismiss the entire petition, vaguely arguing that it is untimely because it was filed after the one-year limitation period expired.² Patterson moved to strike the dismissal motion and for respondents to provide a more definite statement of their untimeliness defense.³ I granted Patterson's motion and gave respondents until February 15, 2022, to file an answer or a new motion to dismiss stating their defense with sufficient particularity.⁴

Respondents timely filed a renewed motion to dismiss, arguing that Ground 1 is unexhausted and Grounds 1 and 2 should be dismissed as procedurally defaulted.⁵ Respondents do not move to dismiss Ground 3.⁶ Patterson admits in his response that Ground 1 is technically

¹ ECF No. 16 (the parties disagree whether Ground 1 should be split into four subgrounds, which an issue I need not and do not resolve in this order).

² ECF No. 18.

³ ECF No. 28.

⁴ ECF No. 35.

⁵ ECF No. 36.

⁶ *See id.*

1 exhausted and defaulted but argues that he can overcome the procedural default of that claim
 2 because his postconviction counsel was ineffective and the other three prongs of the *Martinez v.*
 3 *Ryan* analysis are met.⁷ Patterson contends that Ground 2 is not procedurally defaulted because
 4 the Nevada Supreme Court did not provide an adequate procedural ground for denying that
 5 claim.⁸

6 The parties agree that whether Ground 1 is procedurally defaulted depends on whether it
 7 constitutes a substantial claim of ineffective assistance of trial counsel.⁹ Because that question
 8 appears to be intertwined with the claims' merits, respondents ask me to defer ruling on it until I
 9 adjudicate the petition's merits. I agree and therefore defer the question of whether Ground 1
 10 must be dismissed as procedurally defaulted until a decision on the petition's merits. I also find
 11 that the Nevada Supreme Court gave adequate state procedural grounds for denying the claim in
 12 Ground 2. So I grant the dismissal motion as to Ground 2, defer a decision as to Ground 1 until
 13 after the parties have answered and replied, and set a schedule for the parties to file their
 14 remaining pleadings.

15 Discussion

16 A. Ground 1

17 Patterson argues that Ground 1 is technically exhausted. A claim that has not been
 18 presented to the state court is technically exhausted if "it is clear that the state court would hold
 19 the claim procedurally barred."¹⁰ The state procedural bars that would be implicated in this case
 20 are the one-year time bar¹¹ and the bar against second or successive petitions.¹² Both of these
 21 procedural bars allow for an excuse upon a showing of cause and prejudice or upon a showing of
 22
 23

24 ⁷ ECF No. 46.

25 ⁸ *Id.*

26 ⁹ ECF No. 51.

27 ¹⁰ *Sandgathe v. Maass*, 314 F.3d 371, 376 (9th Cir. 2002) (internal quotation omitted).

28 ¹¹ Nev. Rev. Stat. § 34.726.

¹² *Id.* at § 34.810.

1 actual innocence. And the standards that the state courts apply are substantially the same as the
2 standards that federal courts apply.¹³

3 Petitioners who claim technical exhaustion by procedural default are rarely able to
4 establish cause and prejudice or actual innocence to excuse the default. On one hand, if a
5 petitioner has a viable argument for cause and prejudice or actual innocence under the
6 substantially similar state and federal standards, then the petitioner cannot establish that “it is
7 clear that the state court would hold the claim procedurally barred,”¹⁴ and the ground is not
8 technically exhausted. On the other hand, if a petitioner has no arguments for cause and
9 prejudice or actual innocence, then the ground is technically exhausted but also subject to
10 dismissal as procedurally defaulted.

11 But when federal law recognizes a potential basis to excuse a procedural default and the
12 Nevada state courts do not, then the petitioner can argue in federal court that a ground is
13 technically exhausted and that an excuse for the procedural default exists. Ineffective-assistance-
14 of-trial-counsel claims allow a petitioner to do that. The United States Supreme Court held in
15 *Martinez v. Ryan* that ineffective assistance of state postconviction counsel, or the lack of
16 counsel in state postconviction proceedings, possibly can excuse a procedurally defaulted claim
17 of ineffective assistance of trial counsel.¹⁵ A petitioner must demonstrate that (1) the claim of
18 ineffective assistance of trial counsel is substantial; (2) ineffective assistance of post-conviction
19 counsel (or lack of counsel) is the cause of the default; (3) the post-conviction proceedings were
20 the initial review proceedings for the ineffective-assistance-of-trial-counsel claim; and (4) state
21 law requires, or practically requires, that the claim be raised in the initial post-conviction
22 proceedings.¹⁶

25 ¹³ Compare *Robinson v. Ignacio*, 360 F.3d 1044, 1052 n.3 (9th Cir. 2004), with *Mitchell v. State*,
26 149 P.3d 33, 36 (Nev. 2006).

27 ¹⁴ *Sandgathe*, 314 F.3d at 376.

28 ¹⁵ *Martinez v. Ryan*, 566 U.S. 1 (2012).

¹⁶ *Trevino v. Thaler*, 569 U.S. 413, 423 (2013).

1 The Nevada Supreme Court has declined to recognize cause under *Martinez* as cause to
 2 overcome a state-law procedural bar.¹⁷ So a Nevada habeas petitioner who relies on *Martinez*—
 3 and only *Martinez*—as a basis for overcoming a state procedural bar on an unexhausted claim
 4 can argue that the state courts would hold the claim procedurally barred, but that he nonetheless
 5 has a potentially viable argument for cause and prejudice under federal law.

6 Patterson relies on *Martinez* to overcome a procedural default of Ground 1.¹⁸ It doesn't
 7 appear from the current briefing that Patterson has other potentially viable bases for
 8 demonstrating cause and prejudice that might be recognized by the state courts, which would
 9 preclude a finding of technical exhaustion by procedural default for that claim. I find that a
 10 cause-and-prejudice analysis under *Martinez* for Ground 1 is appropriate here, but I'll wait to
 11 resolve it until after the parties have answered and replied, addressing the claims on their merits.
 12 That way, I will have the benefit of analyzing all of Patterson's claims against a fully developed
 13 factual and legal backdrop.

14 **B. Ground 2**

15 In Ground 2, Patterson argues that he was denied due process because the state
 16 sentencing judge was biased against the charge of arson and anyone charged with that crime.¹⁹
 17 Patterson did not raise this claim in the direct appeal of his convictions that he filed in July
 18 2015.²⁰ But he did raise it in his proper person postconviction state petition.²¹ The state district
 19 court reached the merits of this claim, concluding that the record supports Patterson's argument
 20 and he should be given a new sentencing hearing.²²

21 The Nevada Supreme Court reversed, finding that the state court erred in granting relief
 22 on the judicial-bias claim because it was procedurally defaulted—Patterson waived that claim
 23

24 ¹⁷ *Brown v. McDaniel*, 331 P.3d 867 (Nev. 2014).

25 ¹⁸ ECF No. 46 at 4–11.

26 ¹⁹ ECF No. 16 at 11–14.

27 ²⁰ ECF No. 38-12.

28 ²¹ ECF No. 38-22 at 31–37.

²² ECF No. 41-4 at 13.

1 “by pleading guilty and not raising it on direct appeal” and it “fell outside the limited scope of a
 2 postconviction habeas petition that challenges a judgment of conviction based on a guilty plea as
 3 set forth in NRS 34.810(1)(a).”²³ The Nevada Supreme Court also noted that the Nevada Court
 4 of Appeals, in rejecting Patterson’s challenge to his sentence on direct appeal, concluded “that
 5 the sentencing judge had not closed her mind to the evidence” and “[t]hat decision is the law of
 6 the case on those matters.”²⁴ Respondents move to dismiss Ground 2, arguing that claim was
 7 decided on an independent and adequate state procedural ground. Patterson responds that NRS
 8 34.810(1)(a) is not adequate because it is not consistently applied and is subject to changing state
 9 authority.²⁵ He does not argue that any procedural default of Ground 2 should be excused.²⁶

10 “For a state procedural rule to prevent federal review of federal claims, the state’s rule
 11 must be both adequate and independent.”²⁷ In the habeas context, the Supreme Court has held
 12 that it “will not review a question of federal law decided by a state court if the decision of that
 13 court rests on a state law ground that is independent of the federal question and adequate to
 14 support the judgment.”²⁸ “The doctrine applies to bar federal habeas when a state court declined
 15 to address a prisoner’s federal claims because the prisoner had failed to meet a state procedural
 16 requirement.”²⁹

17 “In order for a state procedural rule to preclude federal review, the rule must be ‘firmly
 18 established and regularly followed.’”³⁰ “The Ninth Circuit has elaborated that a state rule must
 19 be clear, consistently applied, and well-established at the time of the petitioner’s purported
 20 default.”³¹ “If a state procedural rule is not well-established before a petitioner supposedly

21 ²³ ECF 43-15 at 2 (citing *Franklin v. State*, 877 P.2d 1058, 1059 (Nev. 1994)).

22 ²⁴ *Id.* at 3 n.1 (citations omitted).

23 ²⁵ ECF No. 46 at 11–14.

24 ²⁶ *See id.*

25 ²⁷ *Collier v. Bayer*, 408 F.3d 1279, 1284 (9th Cir. 2005) (citing *Coleman v. Thompson*, 501 U.S. 722, 729 (1991)).

26 ²⁸ *Id.* at 1283–84 (quoting *Coleman*, 501 U.S. at 729).

27 ²⁹ *Id.* at 1284 (quoting *Coleman*, 501 U.S. at 729–30).

28 ³⁰ *Id.* (quoting *Ford v. Georgia*, 498 U.S. 411, 423–24 (1991)).

29 ³¹ *Id.* (quotation omitted).

breaks the rule, then the rule cannot prevent federal review of the petitioner’s federal claims.”³²
 “Although the state is not required to articulate every permutation of every rule, a rule held
 generally adequate can be deemed inadequate as applied to particular unique circumstances.”³³
 “Once a petitioner has demonstrated the inadequacy of a rule, the state bears the ultimate burden
 of proving the rule bars federal review.”³⁴

NRS 38.810(1)(a) requires the state district court to dismiss a habeas petition if “[t]he
 petitioner’s conviction was upon a plea of guilty . . . and the petition is not based upon an
 allegation that the plea was involuntarily or unknowingly entered or that plea was entered
 without effective assistance of counsel.” Patterson argues that NRS 34.810(1)(a) is not
 consistently applied because the Nevada Supreme Court recently ruled in *Gonzales v. State* that
 the statute “does not bar post-conviction challenges to sentencing claims following a guilty
 plea.”³⁵ Respondents disagree, arguing that Patterson overreads *Gonzales*’s reach.³⁶
 Respondents also argue that *Gonzales* cannot shift the initial burden about adequacy to them
 because it was decided six years after Patterson defaulted by failing to assert his judicial-bias
 claim in his direct appeal.³⁷

Importantly, *Gonzales* does not concern a judicial-bias-at-sentencing claim. The central
 issue in *Gonzales* was whether NRS 34.810(1)(a) precludes an ineffective-assistance-of-
 sentencing-counsel claim.³⁸ It has long been the rule in Nevada that “challenges to the validity
 of a guilty plea and claims of ineffective assistance of trial and appellate counsel must be first
 pursued in post-state conviction proceedings in the district court.”³⁹ But “all other claims that

³² *Id.*

³³ *Id.* (quoting *Lee v. Kemna*, 534 U.S. 362, 376 (2002); *Bargas v. Burns*, 179 F.3d 1207, 1213 (9th Cir. 1999) (internal quotation omitted)).

³⁴ *Id.* (citing *Bennett v. Mueller*, 322 F.3d 573, 585–86 (9th Cir. 2003)).

³⁵ ECF No. 46 at 12 (emphasis omitted) (citing *Gonzales v. State*, 492 P.3d 556 (Nev. 2021)).

³⁶ ECF No. 51 at 3–6.

³⁷ *Id.* at 5 n.3 (citing *Bennett v. Mueller*, 322 F.3d 573, 585–87 (9th Cir. 2003)).

³⁸ *Gonzales*, 492 P.3d at 559.

³⁹ *Franklin v. State*, 877 P.2d 1058, 1059 (Nev. 1994), *disapproved on other grounds by Thomas v. State*, 979 P.2d 222 (Nev. 1999).

are appropriate for direct appeal must be pursued on direct appeal, or they will be considered waived in subsequent proceedings.”⁴⁰ Included among the claims that will be considered waived if not raised in a direct appeal is “a claim that the district court entertained an actual bias or that there were other conditions that rendered the proceedings unfair.”⁴¹

Gonzales does not alter this landscape. Indeed, writing for the full Nevada Supreme Court, Justice Stiglich summarized: “we explicitly hold today what has been implicit in our caselaw for decades.”⁴² “The core claims prohibited by NRS 34.810(1)(a) are ‘independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea’ that do not allege that the guilty plea was entered involuntarily or unknowingly or without effective assistance of counsel.”⁴³ “Those claims are ‘waived’ by the guilty plea.”⁴⁴ “But where a petitioner argues that he or she received ineffective assistance of counsel at sentencing, he or she could not have raised that claim before entering his or her plea.”⁴⁵ And “[i]t would violate the spirit of our habeas statute and the public policy of this state to prohibit him or her from *ever* raising that claim in state court.”⁴⁶

In reaching this conclusion, the Court noted it has “recognized [that] claims that could have been raised on direct appeal, but were not, are waived in subsequent proceedings.”⁴⁷ But it has also “entertained ineffective-assistance-of-counsel claims arising after the plea while rejecting other independent claims presented in the same petition as barred under NRS 34.810(1)(a), thus implicitly recognizing the limitations of the statute.”⁴⁸ And considering NRS

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Gonzales*, 492 P.3d at 562.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 560 (citing *Franklin*, 877 P.2d at 1059).

⁴⁸ *Id.* at 561–62 (citing *Toston v. State*, 267 P.3d 795, 800–01 (Nev. 2011) (explaining claims that the prosecutor committed misconduct and the district court abused its discretion “are outside the scope of claims that may be raised in a post-conviction habeas petition challenging a conviction that is based on a guilty plea”)).

Chapter 34 as a whole, the Court explained, “it is clear that the Legislature meant to provide *one* remedy, not more, and thus barred petitioners from raising most claims that were or should have been raised earlier.”⁴⁹

Gonzales doesn’t state that all sentencing claims can now be raised in a postconviction petition. It simply makes clear that NRS 34.810(1)(a) “preclude[s] wasteful litigation of certain *pre-plea* violations,”⁵⁰ and it preserves the Legislature’s intention to provide one remedy by explicitly stating that ineffective-assistance-at-sentencing claims can be brought in postconviction petitions. Respondents point out in their reply that the Nevada Supreme Court determined that Patterson’s judicial-bias claim was waived because he pled guilty and did not raise it on direct appeal. *Gonzales* explicitly acknowledged that procedural bar and did not alter it. So I do not find that *Gonzales* raises a genuine question whether the procedural bars that the Nevada Supreme Court applied to preclude Patterson’s judicial-bias claim are inadequate, and I grant the dismissal motion as to Ground 2.

Conclusion

IT IS THEREFORE ORDERED that respondents’ Renewed Motion to Dismiss Second Amended Petition for Writ of Habeas Corpus [ECF No. 36] is **GRANTED IN PART**:


- Ground 1 is actually unexhausted but technically exhausted because it would be procedurally barred by the state courts. But a decision on whether Patterson can demonstrate cause and prejudice under *Martinez* is DEFERRED until after the parties have answered and replied; and
- Ground 2 is dismissed as procedurally barred.

IT IS FURTHER ORDERED that **respondents have until September 26, 2022, to file and serve an answer** to Patterson’s remaining grounds for relief: 1 and 3. The answer must contain all substantive and procedural arguments as to all surviving grounds of the petition, including whether Ground 1 is barred by procedural default under federal law. The answer must

⁴⁹ *Id.* at 560 (citing Nev. Rev. Stat. § 34.810(2); *Harris v. State*, 329 P.3d 619 (Nev. 2014)).

⁵⁰ *Id.* at 561.

1 also comply with Rule 5 of the Rules Governing Proceedings in the United States District Courts
2 under 28 U.S.C. § 2254. Petitioner Patterson will then have 30 days following service of
3 respondents' answer to file a reply.

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5 
6 U.S. District Judge Jennifer A. Dorsey
7 Dated: August 23, 2022
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